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No. 10-425

IN THE

Supreme Court of the United States

TORREY BAUER, The Honorable DAVID CERTO, and INDIANA RIGHT TO LIFE, INC.,
Petitioners,

v.

The Honorable RANDALL T. SHEPARD, in his official capacity as Chair of the Indiana Commission on Judicial Qualifications, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION TO PETITION

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QUESTIONS PRESENTED

1. Whether, consistent with the First Amendment, Indiana may preclude judges and judicial candidates from, "in connection with cases, controversies, or issues that are likely to come before the court, mak[ing] pledges, promises, or commitments that are inconsistent with the impartial[] performance of adjudicative duties of judicial office."

2. Whether, consistent with the First Amendment, Indiana may stop judges and judicial candidates from leading or speaking on behalf of any political organization where Indiana permits them to be members of political parties and attend political functions.

3. Whether, consistent with the First Amendment, Indiana may prohibit judges and judicial candidates from personally soliciting or accepting campaign contributions as long as it permits them to do so through a campaign committee.

PARTIES TO THE PROCEEDINGS

A complete list of Respondents not contained in the caption:

Randall T. Shepard, Indiana Chief Justice and Chair
Mike Gavin
John O. Feighner
Christine H. Keck
Fred McCashland
James O. McDonald
William E. Winningham

All in their official capacities as Members of the Indiana Commission on Judicial Qualifications

Fred Austerman, Chair
Maureen Grinsfelder
Corinne R. Finnerty
Catherine A. Nestrick
R. Anthony Prather
J. Mark Robinson
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All in their official capacities as Members of the Indiana Disciplinary Commission

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

STATEMENT 1

REASONS TO DENY THE PETITION 8

I. Abstract Tension Among Lower Courts Concerning the Proper Legal Standard Does Not Justify Review 9

II. No Lower-Court Conflict, or Tension with White I, Justifies Review of the Commitments Canon 11

III. There is No Circuit Conflict Justifying Review of the Partisan Activities Canon 16

IV. Indiana's Ban on Direct Solicitation Validly Prevents Abuse of Judicial Office 18

V. This Case Does Not Present Any Significant As-Applied Challenges 23

VI. There is no Point Reviewing Superseded Canons 26

CONCLUSION 28

TABLE OF AUTHORITIES

CASES

Bauer v. Shepard,
634 F.Supp.2d 912 (N.D. Ind. 2009)..... 11

Buckley v. Judicial Inquiry Board,
997 F.2d 224 (7th Cir. 1993)..... 12

Buckley v. Valeo,
424 U.S. 1 (1976)..... 25

Carey v. Wolnitzek,
614 F.3d 189 (6th Cir. 2010).....12, 13, 19, 20

Citizens United v. Federal Election Commission,
130 S.Ct. 876 (2010)..... 20, 25

FEC v. Wisconsin Right to Life,
551 U.S. 449 (2007)..... 25

Federal Election Comm'n v. Beaumont,
539 U.S. 146 (2003)..... 23

Indiana Right to Life, Inc. v. Shepard,
507 F.3d 545 (7th Cir. 2007)..... 3, 4, 11

In re Dunleavy,
838 A.2d 338 (Me. 2003) 22

In re Fadeley,
802 P.2d 31 (Or. 1990) 22

CASES [CONT'D]

In re Kinsey,
842 So.2d 77 (Fla. 2003) 14

In re Watson,
794 N.E.2d 1 (N.Y. 2003) 14

Kansas Judicial Review v. Stout,
562 F.3d 1240 (10th Cir. 2009) 27

Parker v. Levy,
417 U.S. 733 (1974) 25

Pickering v. Board of Education,
391 U.S. 563 (1968) 20

Republican Party of Minnesota v. White,
416 F.3d 738 (8th Cir. 2005) ..... *passim*

Republican Party of Minnesota v. White,
536 U.S. 765 (2002) ..... *passim*

Siefert v. Alexander,
608 F.3d 974 (7th Cir. 2010) 17

Stretton v. Disciplinary Board of the Supreme Court of Pennsylvania,
944 F.2d 137 (3d Cir. 1991) 22

United States Civil Service Commission v. National Association of Letter Carriers, AFL-CIO,
413 U.S. 548 (1973) 20, 25

CASES [CONT'D]

United States v. Wright,
22 F.3d 787 (8th Cir. 1994) 20, 21

Weaver v. Bonner,
309 F.3d 1312 (11th Cir. 2002) 19, 22

Wersal v. Sexton,
613 F.3d 821 (8th Cir. 2010) ..... *passim*

STATUTES

Ind. Code § 33-33-49-13 4

OTHER AUTHORITIES

ABA Model Code of Judicial Conduct Canon
5A(1)(a) (1990) 2

ABA Model Code of Judicial Conduct Canon
5A(1)(c) (1990) 2

ABA Model Code of Judicial Conduct Canon
5A(1)(e) (1990) 2

ABA Model Code of Judicial Conduct Canon
5C(2) (1990) 2

Code of Judicial Conduct for United States
Judges Canon 4(C) 23

Code of Judicial Conduct for United States
Judges Canon 5(A) 16

OTHER AUTHORITIES [CONT'D]

Eugene Gressman et al., Supreme Court Practice (9th ed. 2007) 10

Ind. Code of Judicial Conduct Canon 2.10(B) (2009) 1

Ind. Code of Judicial Conduct Canon 3E(1) (2008) 5

Ind. Code of Judicial Conduct Canon 4.1, Comment 1 (2009) 18

Ind. Code of Judicial Conduct Canon 4.1, Comment 4 (2009) 18

Ind. Code of Judicial Conduct Canon 4.1(A)(1) (2009) 2, 16

Ind. Code of Judicial Conduct Canon 4.1(A)(2) (2009) 2, 16

Ind. Code of Judicial Conduct Canon 4.1(A)(3) (2009) 17

Ind. Code of Judicial Conduct Canon 4.1(A)(4) (2009) 2, 9

Ind. Code of Judicial Conduct Canon 4.1(A)(8) (2009) 2

Ind. Code of Judicial Conduct Canon 4.1(A)(13) (2009) 1, 12

OTHER AUTHORITIES [CONT'D]

Ind. Code of Judicial Conduct Canon 5A(1)(a) (2008) 6

Ind. Code of Judicial Conduct Canon 5A(1)(b) (2008) 6

Ind. Code of Judicial Conduct Canon 5A(1)(c) (2008) 6

Ind. Code of Judicial Conduct Canon 5A(1)(e) (2008) 6

Ind. Code of Judicial Conduct Canon 5A(3)(d)(i) (2008) 3, 5, 26, 27

Ind. Code of Judicial Conduct Canon 5A(3)(d)(ii) (2008) 3, 5, 26, 27

Ind. Code of Judicial Conduct Canon 5C(1)(g) (2008) 6

Ind. Code of Judicial Conduct Canon 5C(2) (2008) 6

Ind. Code of Judicial Conduct Canon 7(B)(1)(c) (1975) 2

Ind. Code of Judicial Conduct, Terminology 1, 12

Kentucky Judicial Canon 5(B)(1)(c) 12

STATEMENT

By pressing for review of a handful of Indiana judicial canons, petitioners in effect ask the Court to consider whether the First Amendment, particularly in the wake of *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002) ("*White I*"), requires states to open their judicial elections to unfettered politicking. None of the traditional reasons for granting *certiorari*, however, counsels in favor of indulging petitioners in their quest to make judicial elections look like legislative elections.

1. Six rules of the Indiana Code of Judicial Conduct, comprising three analytically useful groups relating to judicial election campaigns, are at stake here:

- **Canons 2.10(B) and 4.1(A)(13):** A judge or a judicial candidate shall not "in connection with cases, controversies, or issues that are likely to come before the court, make pledges, promises, or commitments that are inconsistent with the impartial* performance of the adjudicative duties of judicial office." The term "impartial" is defined to mean "absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintenance of an open mind in considering issues that may come before a judge." Ind. Code of Judicial Conduct, "Terminology." This brief will refer to these canons, collectively, as the Commitments Canon.

- **Canons 4.1(A)(1) and (2)**: "[A] judge or judicial candidate[] shall not: *** (1) act as a leader in or hold an office in a political organization[]; (2) make speeches on behalf of a political organization." This brief will refer to these together as the Partisan Activities Canon.

- **Canons 4.1(A)(4) and (8)**: "[A] judge or judicial candidate[] shall not: *** (4) solicit funds for, pay an assessment to, or make a contribution to a political organization or a candidate for public office;*** (8) personally solicit or accept campaign contributions other than through a campaign committee authorized by Rule 4.4." This brief will refer to these rules together as the Direct Solicitation Canon.

The 2009 recodification of these canons brought them into line with the 2007 ABA Model Code of Judicial Conduct, but variations of them date back decades. *See, e.g.*, Ind. Code of Judicial Conduct, Canon 7(B)(1)(c) (1975); ABA Model Code of Judicial Conduct, Canons 5A(1)(a), 5A(1)(c), 5A(1)(e), 5C(2) (1990). In fact, as discussed in greater detail below, it was Indiana's prior version of the Commitments Canon that precipitated this lawsuit. In any event, these canons do not represent new or experimental rules for judges.

2. Indiana Right to Life ("IRTL"), a non-profit corporation whose purpose is "to support legislative and constitutional changes that protect the right to

life," began sending questionnaires to state-court judicial candidates in 2002, asking them to respond to a series of questions about legal rights to abortion, physician-assisted suicide, and related matters. *See* App. 38a-43a. A few judges provided substantive responses (*i.e.*, yes or no answers) to IRTL's questionnaire in 2002. *See Indiana Right to Life, Inc. v. Shepard*, 507 F.3d 545, 547 (7th Cir. 2007). None has ever been disciplined for doing so. App. 49a.

In June 2004, IRTL sent a nearly identical questionnaire to all judicial candidates in the state. *Indiana Right to Life, Inc.*, 507 F.3d at 547-48. Several contacted the Indiana Commission on Judicial Qualifications about whether the judicial canons permitted them to respond to the questionnaire. *Id.* at 548. IRTL received a few substantive responses to its 2004 questionnaire, but also received some responses indicating that the candidate was choosing not to provide substantive answers. *Id.*

When its 2004 questionnaire failed to yield many substantive responses, IRTL and two prospective voters filed a federal court lawsuit against the Commission challenging the prior Indiana Judicial Canons 5A(3)(d)(i) and (ii), which prohibited judges and judicial candidates from making (or appearing to make) pledges, promises and commitments, alleging that these canons caused the low response rate. *Id.* at 546. As part of its case, IRTL deposed eight of the judges to whom it sent questionnaires. It even noticed the deposition of Indiana's Chief Justice,

Randall Shepard, only to cancel the deposition less than five hours before it was scheduled to begin. The district court sanctioned IRTL for this conduct, ordering it to pay $2,455 in attorneys' fees.

That case ultimately foundered, however, because IRTL could not adduce testimony that any of the judges had refused to answer the IRTL questionnaire on account of the Indiana Canons. The Seventh Circuit dismissed the case for lack of standing because no judge or judicial candidate wanted to answer IRTL's questionnaire. *Indiana Right to Life, Inc.*, 507 F.3d at 549-50.

In 2008, IRTL again sent substantially similar questionnaires to judicial candidates. App. 3a. Among the recipients were judicial candidates Torrey Bauer and Judge David Certo. *Id.* Mr. Bauer was a candidate for the Republican nomination for Kosciusko County Superior Court judge, which nomination was to be decided in the May 2008 Republican Party Primary. App. 43a. He provided substantive answers to the IRTL questionnaire. *Id.*

Judge Certo, having been appointed to fill a vacancy on the Marion County Superior Court bench in 2007, was facing his first judicial election. App. 44a. Under the Marion County judicial election system, where the Republican and Democratic parties divide the available judgeships and submit slates of candidates for their allotted positions, *see* Ind. Code § 33-33-49-13, Judge Certo was functionally unopposed for both the May 2008 party

primary and the November 2008 general election. PI Tr. 28-31. Notwithstanding the certainty of his election, Judge Certo wished to provide substantive answers to the questionnaire but did not because he was worried that doing so might violate prior Indiana Judicial Canons 5A(3)(d)(i) and (ii), prohibiting pledges, promises and commitments. App. 44a.

3. On April 18, 2008, IRTL recruited candidate Bauer, who answered the 2008 questionnaire but subsequently became concerned that by doing so he might have violated prior Canons 5A(3)(d)(i) and (ii), and Judge Certo, who refrained from answering the 2008 questionnaire for the same reason, to join it in filing this action against the Commission. They sought declaratory and injunctive relief barring enforcement of the prior Canons 5A(3)(d)(i) and (ii), and the recusal requirement in prior Indiana Judicial Canon 3E(1) (which is no longer at issue). App. 31a.

Because Bauer's primary election was near, IRTL requested a preliminary injunction prohibiting the Commission from initiating enforcement proceedings if IRTL published Bauer's questionnaire responses. App. 32a. On May 6, 2008, the district court enjoined the Commission from initiating disciplinary proceedings under prior Canons 5A(3)(d)(i) and (ii) while it decided the merits. App. 32a.

Shortly thereafter, petitioners amended their complaint to add Judge Certo's facial and as-applied challenges to the Partisan Activities Canon (prior

Canons 5A(1)(a) and (c)) and the Direct Solicitation Canon (prior Canons 5A(1)(e) and 5C(2)), as well as the public endorsement restrictions of prior Canons 5A(1)(b) and 5C(1)(g) (which have never been pursued at any stage of the case). App. 32a. Judge Certo based his challenge to the Partisan Activities Canon on his desire to serve as a delegate to the Indiana State Republican Convention and to speak on behalf of the Republican Party at the Eastern Indiana Model Legislature, a youth conclave devoted to civics. App. 45a. He based his challenge to the Direct Solicitation Canon on his wish to solicit funds for his campaign from family members, former roommates and classmates. App. 44a.

Once the new Indiana Canons went into effect on January 1, 2009, petitioners filed a second amended complaint restating their facial and as-applied claims challenging the Commitments, Direct Solicitation and Partisan Activities Canons under the 2009 Indiana Judicial Code. App. 35a-36a. Petitioners, however, have also maintained their claims against the superseded canons on the theory that their prior conduct might be prosecuted under those prior canons. App. 36a.

Ultimately, following discovery and summary judgment cross-motions, the district court sided with the state on the merits, rejected all of petitioners' claims and vacated its preliminary injunction. App. 116a.

4. The Court of Appeals affirmed in all material respects in a unanimous opinion authored by Chief

Judge Easterbrook. App. 1a-28a. The court held that the speech prohibited by the Commitments Canon—"(promises 'inconsistent with the impartial performance of' judicial duties)"—is not constitutionally protected. App. 20a-22a. "*White I*," the Seventh Circuit observed, "did not hold that judges may make commitments or promises about behavior in office." App. 21a. Furthermore, "[n]othing in *White I* deals with statements of this flavor, or any other promise to act on the bench as a partisan of a political agenda." App. 21a. Upon this reasoning, the court rejected claims of overbreadth and vagueness and further held that the Due Process Clause permits an administrative body, such as the Commission, to issue advisory opinions and flesh out details about the canons' applicability to any given situation. App. 21a-26a.

The Court of Appeals turned aside Certo's challenge to the Partisan Activities Canon. App. 11a-17a. The political limitations for judges were valid for three principal reasons: "first, judges . . . must be seen as impartial if judicial decisions are to be accepted by the public, and participation in politics undermines the appearance of impartiality; second, judges are not entitled to lend the prestige of office (which after all belongs to the people, not to the temporary occupant) to some other goal; third, states have a compelling interest in 'preventing judges from becoming party bosses or power-brokers' . . . something that would undermine *actual* impartiality, as well as its appearance." App. 13a (citation omitted).

Indeed, the Seventh Circuit observed, the need to prevent misuse of judicial status goes well beyond regulating partisan campaigns. "The desire to prevent judges from using the prestige of office for other ends underlies a great deal of the Code of Judicial Conduct for United States Judges." App. 14a.

Finally, the court also rejected Judge Certo's challenge to the Direct Solicitation Canon based on his desire to solicit friends and relatives. It observed that there can be no distinction for the solicitation of donors the candidate knows, as the "potential for actual or perceived back scratching, or for retaliation against attorneys who decline to donate . . . is the same whether or not the judge knows the potential donor's first name." App. 10a. As for soliciting family members, "Judge Certo should follow Indiana's procedure for obtaining advice" from the Commission. *Id.*

REASONS TO DENY THE PETITION

Petitioners ask the Court to comb through and review fourteen First Amendment issues, as if to suggest (implausibly) that the Seventh Circuit broke new ground for every judicial canon on the books. They may hope to use this case to deregulate judicial election campaigns, but the decision below written by Chief Judge Easterbrook provides little reason for the Court to become involved. The Seventh Circuit, examining common, time-tested restrictions on judicial speech, reached the same unremarkable First Amendment conclusions as nearly all courts.

Fortunately, the plausible questions for review can be boiled down from fourteen to three, concerning the validity of the Commitments Canon, the Direct Solicitation Canon, and the Partisan Activities Canon. Petitioners also purport to challenge the party solicitation clause of Canon 4.1(A)(4), *see* Petition at 17, but the complaint never asserted such a claim, so that issue is waived.

Of the three plausible issues before the Court, only one—the Direct Solicitation Canon—arrives amidst inter-circuit tension. The others have not generated any conflict or other review-worthy hallmarks. Particularly given the spray of issues proposed by the Petition and the multiple layers of complexity petitioners associate with each, the Court, rather than take this case to review a shallow conflict on the Direct Solicitation Canon, should allow the issue to percolate in lower courts.

I. Abstract Tension Among Lower Courts Concerning the Proper Legal Standard Does Not Justify Review

As part of their broadside attack on judicial election campaign restraints, petitioners urge the Court to intercede expressly to determine the level of scrutiny applicable to *all* canons affecting "judicial campaign speech." Petition at 13. Any failure of lower courts to apply the same exact level of First Amendment scrutiny to all judicial canons, however, does not alone attest to the cert-worthiness of this case.

There is no need for the Court to take a case merely to resolve abstract tension in the legal standards applied by lower courts. *See* Eugene Gressman et al., Supreme Court Practice, 241 (9th ed. 2007) (the Court rarely grants *certiorari* when there is "merely an inconsistency in dicta or in the general principles utilized."). What matters is whether the lower courts ultimately agree concerning the validity of the same or similar laws from different states. *Id.* at 242 ("A genuine conflict, as opposed to a mere conflict in principle, arises when it may be said with confidence that two courts have decided the same legal issue in opposite ways, based on their holdings in different cases with very similar facts.").

If the lower courts' ultimate determinations of constitutionality are in conflict such that Supreme Court review is warranted, of course, the Court will address the proper legal standard in the process of reviewing the ultimate question of constitutional validity. But, if there is no ultimate conflict as to the constitutionality of a particular type of law, there is no point in taking a case just to review the legal standard lower courts have applied. In this regard, as demonstrated below, there are no ultimate issues of constitutionality that warrant review.

II. No Lower-Court Conflict, or Tension with *White I*, Justifies Review of the Commitments Canon

This case was originally only about whether Indiana can prohibit judges and judicial candidates from making pledges, promises or commitments. *See* Complaint, *Bauer v. Shepard*, 634 F.Supp.2d 912 (N.D. Ind. 2009) (No. 3:08-CV-196-TLS). Petitioners later amended the complaint and the case metamorphosed into a broadside attack on judicial campaign regulations more generally, but the main thrust of the case until now has always been petitioners' contention that the Commitments Canon is indistinguishable from the Announce Canon invalidated in *White I*. IRTL filed this case (as well as the earlier litigation dismissed on standing grounds, *see Indiana Right to Life, Inc.*, 507 F.3d at 549-50), because it wanted to clear the way for judges and judicial candidates to answer its questionnaires. As a consequence, both the district court and the Seventh Circuit treated the Commitments Canon as the main issue in the case. *See* App. 1a-28a, 92a-99a. Indeed, IRTL, the lead plaintiff, does not even have a stake in the other canons governing judicial campaigns that are at issue here.

The Petition, however, downplays the significance of the Commitments Canon issue—it barely even makes the top 10 questions presented. The reason for its subordination is obvious enough—there is no circuit conflict involving the Commitments Canon. IRTL says only that the ruling below "conflicts with

decisions of the Court and with *Carey* and *Buckley*. . . ." Petition at 20-23 (referring to *White I*; *Carey v. Wolnitzek*, 614 F.3d 189, 207-09 (6th Cir. 2010); and *Buckley v. Judicial Inquiry Board*, 997 F.2d 224, 228-29 (7th Cir. 1993)). But those asserted conflicts do not pan out.

First, alleging conflict with precedent from the same circuit—here *Buckley v. Judicial Inquiry Board*, 997 F.2d 224, 228-29 (7th Cir. 1993)—does not justify *certiorari*. If the decision below conflicts with *Buckley*, petitioners should have requested *en banc* review, not come to the Court demanding supervision. Regardless, there is no such intra-circuit conflict. Indiana's Commitments Canon is more narrowly targeted than the canon invalidated by *Buckley*, which prohibited judicial candidates from making "[p]ledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office." *Id.* at 225 (quoting Ill. S. Ct. R. 67(B)(1)(c)). That rule permitted far less speech than the current Indiana Commitments Canon, which allows *any* speech "consistent with the impartial administration of justice," *i.e.*, any speech consistent with judicial open-mindedness. Canon 4.1(A)(13); Code of Judicial Conduct, "Terminology."

Second, there is no conflict between the decision below and the Sixth Circuit's decision regarding Kentucky's judicial canons in *Carey*. Kentucky Judicial Canon 5(B)(1)(c) prohibits "intentionally or recklessly mak[ing] a statement that a reasonable person would perceive as committing a judge or

candidate to rule a certain way in a case, controversy, or issue that is likely to come before the court." The Sixth Circuit thought this provision ambiguous and remanded for the district court to determine its scope. *Carey*, 614 F.3d at 208. The Sixth Circuit has made no final judgment as to the constitutionality of the Kentucky Pledges Canon, so any inference that the Sixth Circuit would disagree with the decision below is premature and speculative.

Finally, this Court in *White I* pointedly did not declare, presuppose, or imply the invalidity of canons restricting pledges, promises or commitments by judges and judicial candidates. When the Court considered the constitutionality of the Minnesota Announce Canon, it said "the Minnesota Code contains a so-called 'pledges or promises' clause, which *separately* prohibits judicial candidates from making 'pledges or promises of conduct in office other than the faithful and impartial performance of the duties of office' . . . —a prohibition that is not challenged here and on which we express no view." *White I*, 536 U.S. at 770; *see also id.* at 780 ("But, as noted earlier, the Minnesota Supreme Court has adopted a separate prohibition on campaign 'pledges or promises' which is not challenged here.").

What is more, four Justices in *White I* expressed the view that the Minnesota pledges clause was permissible: "The constitutionality of the pledges or promises clause is thus amply supported; the provision not only advances due process of law for litigants in Minnesota courts, it also reinforces the

authority of the Minnesota judiciary by promoting public confidence in the State's judges." *Id.* at 819 (Ginsburg, J., joined by Stevens, J., Souter, J., and Breyer, J., dissenting).

Accordingly, it is no surprise that, shortly after the *White I* decision in 2002, state supreme courts upheld judicial canons similar to Indiana's Commitments Canon. In *In re Watson*, 794 N.E.2d 1, 5-8 (N.Y. 2003), the New York Court of Appeals ruled that the state's interest in using a similar canon to ensure due process is "overriding" because "[t]here is hardly . . . a higher governmental interest than a State's interest in the quality of its judiciary." *Watson*, 794 N.E.2d at 6 (internal quotations omitted). And in *In re Kinsey*, 842 So.2d 77, 85-89 (Fla. 2003), the Florida Supreme Court held that the analogous Florida canon "serves a compelling state interest in preserving the integrity of our judiciary and maintaining the public confidence in an impartial judiciary." *Kinsey*, 842 So.2d at 87.

The First Amendment question is whether the self-evident likelihood that campaign promises will yield judges with a particular kind of unrelenting closed-mindedness, and thereby defeat due process, is enough to tip the scales in favor of a targeted prophylactic restriction on judicial speech. *Some* rule against judicial-campaign promises concerning issues and cases likely to come before the court is "necessary" to protect due process. *See White I*, 536 U.S. at 776-77. The Indiana Commitments Canon is targeted, understood, and administered with sufficient precision and sensitivity to advance due

process without squelching all relevant campaign debate. If the canon were any narrower, it would be ineffective.

What is more, the decision below observed that petitioners incorrectly "treat as 'overbroad' any law forbidding any speech that is constitutionally protected." Pet. App. 20a. Even assuming the Commitments Clause might proscribe *some* protected speech (and the Seventh Circuit was hard-pressed to understand how it could), a law is facially invalid under the First Amendment only if its main applications are "substantially overbroad" in relation to protected speech. Pet. App. 21a-22a. Yet here petitioners "do not seriously contend that the commits clauses are overbroad in *that* sense." Pet. App. 22a. In fact, petitioners have never identified any other "announced views" they fear the Commitments Canon's "uncertain scope" may "proscribe." Petition at 27. As the court below put it, "[p]laintiffs want us to deem the law vague by identifying situations in which state officials *might* take an untenably broad reading of the commits clauses, and then predicting that they *will* do so." Pet. App. 24a.

The Court should not concern itself with petitioners' theoretical arguments in this regard. And, as there is no lower-court conflict over the validity of state judicial Commitments Canons, and no tension with *White I*, there is no reason for the Court to take up this issue.

III. There is No Circuit Conflict Justifying Review of the Partisan Activities Canon

Petitioners argue that the decision below upholding Indiana's Partisan Activities Canon conflicts with holdings of the Eighth Circuit in *Wersal v. Sexton*, 613 F.3d 821, 834 (8th Cir. 2010), *vacated on reh'g en banc* (8th Cir. Oct. 15, 2010), and *Republican Party of Minnesota v. White*, 416 F.3d 738, 754 (8th Cir. 2005) (*en banc*) ("*White II*"). This assertion is incorrect. Those cases addressed different, and far broader, restrictions on judicial candidate speech.

In the Partisan Activities Canon, Indiana merely precludes judges and judicial candidates from holding party leadership posts and, in the same vein, from speaking on behalf of political parties. *See* Ind. Code of Judicial Conduct, Canon 4.1(A)(1), (2). Indeed, insofar as Indiana's Partisan Activities Canon is matched by the federal judiciary's own speech restrictions, *see* Code of Judicial Conduct for United States Judges, Canon 5(A),[1] they are well within the mainstream of judicial regulation.

By contrast, in *White II*, the Eighth Circuit invalidated a canon that prohibited judges and judicial candidates from even identifying with a political party. *See White II*, 416 F.3d at 745. Indiana has no analogous canon—judges and judicial

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[1] Code of Judicial Conduct for United States Judges, Canon 5(A): "A judge should not: (1) act as a leader or hold any office in a political organization; (2) make speeches for a political organization or candidate."

candidates in Indiana may embrace party affiliations. What is more, the Seventh Circuit, in *Siefert v. Alexander*, 608 F.3d 974 (7th Cir. 2010), invalidated a Wisconsin canon prohibiting judicial candidates from affiliating with any party, but the Seventh Circuit saw no tension between that decision and its conclusion in this case that Indiana's Partisan Activities Canon is valid. Hence, the decision below does not conflict with *White II*.

Next, in *Wersal*, a panel of the Eighth Circuit invalidated a canon precluding judges and judicial candidates from endorsing or opposing candidates for other offices. *See Wersal*, 613 F.3d at 833-38. That decision, however, has been vacated pending *en banc* review, *see Wersal*, 613 F.3d 821, *vacated on reh'g en banc* (8th Cir. Oct. 15, 2010),[2] so it does not stand in conflict with any decisions of other courts, including the decision below. And while Indiana has a similar canon precluding candidate endorsements in other races, *see* Indiana Code of Judicial Conduct, Canon 4.1(A)(3), that canon has not been challenged in this litigation.

Moreover, Indiana's restrictions against partisan leadership by judges and judicial candidates fit comfortably within the Court's First Amendment doctrine. The Court has emphatically denied that judicial politics must be treated the same as legislative politics. *See White I*, 536 U.S. at 783 ("we neither assert nor imply that the First Amendment requires campaigns for judicial office to sound the

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[2] The *en banc* Eighth Circuit heard oral argument in *Wersal* on January 10, 2011.

same as those for legislative office"); *see also id.* at 805-06 (Ginsburg, J., dissenting) ("I would differentiate elections for political offices. . . . Legislative and executive officials serve in representative capacities. . . . Judges, however, are not political actors."). Restraining judges from party leadership and speaking roles, which are among the most partisan of election-related activities judicial candidates might undertake, is one way Indiana prevents judicial campaigns from resembling legislative campaigns.

More broadly, Indiana's Partisan Activities Canon is designed to: (1) prevent the use of judicial prestige in the service of private interests, *see* Indiana Code of Judicial Conduct, Canon 4.1, Comment 4; and (2) preserve the judiciary as credible, independent arbiters rather than party functionaries, *see* Indiana Code of Judicial Conduct, Canon 4.1, Comment 1. A judge who, as a convention delegate, throws political weight behind candidates and platforms, as Judge Certo would like to do, abuses judicial prestige and erodes judicial independence in a way that mere party affiliation (or even attendance at political meetings) could never do. Indiana's partisan-activity restrictions are therefore sufficiently narrow in scope to be valid, and there is no call for the Court to take this case to review them.

IV. Indiana's Ban on Direct Solicitation Validly Prevents Abuse of Judicial Office

Petitioners argue that the Direct Solicitation Canon, which prohibits Judge Certo from personally

soliciting campaign contributions, is unconstitutional, and that the Seventh Circuit's opinion otherwise conflicts with decisions from the Sixth, Eighth and Eleventh Circuits. *See* Petition at 14-15 (citing *Carey*, 614 F.3d at 204-07 (6th Cir. 2010); *Wersal*, 613 F.3d at 838-41 (8th Cir. 2010), *vacated on reh'g en banc* (8th Cir. Oct. 15, 2010); *White II*, 416 F.3d at 753-54 (8th Cir. 2005) (*en banc*); and *Weaver v. Bonner*, 309 F.3d 1312, 1319 (11th Cir. 2002), *reh'g & reh'g en banc denied*, 57 Fed.App'x 416 (11th Cir. 2003)). Only *Weaver*, however, presents actual ongoing tension with the decision below, so the Court should let this issue percolate awhile longer before addressing it.

Carey does not conflict with the decision below because it focused on an entirely different type of solicitation than is at issue here. As the Seventh Circuit observed, the court in *Carey* "did not question the propriety of limits on in-person solicitation, where the possibility of reward or retaliation is greatest, but concluded that Kentucky's rule is substantially overbroad because it covers solicitation by mass mailing." App. 10a-11a. Here, however, "Certo has not made anything of the fact that the definition of 'personally solicit' in Indiana's Code includes letters, so it is unnecessary to address the distinction drawn in *Carey* between in-person and written solicitations." *Id.* Thus, *Carey* and the opinion below peacefully coexist. In later cases the Seventh Circuit might, consistent with its decision here, reach the same holding as *Carey* with respect to mass mailing solicitations. Or, the Sixth Circuit might, consistent with *Carey*, reach the same

holding as the decision below with regard to in-person solicitations. With those options so plainly available, there is no need for the Court to intercede in light of *Carey*.

Next, the Eighth Circuit's decision in *Wersal* invalidating Minnesota's Direct Solicitation Canon does not justify review because, again, it has been vacated on rehearing. *See Wersal*, 613 F.3d 821, *vacated on reh'g en banc* (8th Cir. Oct. 15, 2010). The full Eighth Circuit might well agree with the Seventh Circuit that *Citizens United v. Federal Election Commission*, 130 S.Ct. 876, 899 (2010), *United States Civil Service Commission v. National Association of Letter Carriers, AFL-CIO*, 413 U.S. 548 (1973), and *Pickering v. Board of Education*, 391 U.S. 563 (1968), support such restrictions on judicial politicking. *See* App. 17a ("Although *Wersal* . . . recently held that Minnesota's equivalents of . . . Rule 4.1(A)(4) and (8) (the solicitation limits) violate the first amendment, it did not discuss (or even cite) *Pickering*, *Letter Carriers*, or any of the Supreme Court's other decisions concerning restrictions on public employees' political activities."). Accordingly, reviewing the issue in *this* case would be premature.

The Eighth Circuit's pending *en banc* review in *Wersal*, of course, equally negates any need to review this case in light of *White II*. Whatever tensions may exist between the decision below and *White II*, or any other Eighth Circuit cases, can be fully worked out in the *Wersal en banc* proceeding, where the full Eighth Circuit can reverse circuit precedent if need be. *See, e.g., United States v. Wright*, 22 F.3d 787,

788 (8th Cir. 1994) (observing that the court sitting *en banc* can overrule prior panel opinions).

Regardless, *White II* is not in conflict with the Seventh Circuit's decision in this case. Here, again, Certo focused his arguments on whether Indiana can restrict in-person solicitations, *see* App. 11a, while in *White II* the issue was whether the First Amendment entitles candidates to "solicit contributions from large groups" and, through campaign committees, "transmit solicitation messages above their personal signatures." *White II*, 416 F.3d at 764. The Eighth Circuit noted that the appellants in that case did not "challenge the campaign committee system that Canon 5 provides under which candidates may establish committees that may solicit funds on behalf of the candidate." *Id.* at 764-765. Indeed, the Eighth Circuit observed in *White II* that barriers to in-person solicitation were permissible because "[k]eeping candidates, who may be elected judges, from directly soliciting money from individuals who may come before them certainly addresses a compelling state interest as to parties to a particular case." *Id.* at 765. Consistent with that observation, the Seventh Circuit held in this case that prohibiting judges or judicial candidates from personally soliciting money from individuals who may come before them advances a compelling state interest in protecting due process from corruption or the appearance of corruption. *See generally*, App. 8a-10a.

Still, there is no disputing that the decision below stands in conflict with the Eleventh Circuit's

decision in *Weaver*. In that case, the court invalidated a prohibition against direct, in-person solicitation by judges and judicial candidates, the same sort of canon that is at issue here. *See Weaver*, 309 F.3d at 1322-23.

The Court, however, should not grant review based on this shallow, one-case conflict. The Seventh and Eleventh Circuits are the only circuits to have issued final judgments concerning prohibitions on personal, in-person solicitation *after* this Court's decision in *White I*.[3] Prior to *White I*, the Third Circuit upheld a solicitation restriction where the judicial candidate wanted to send mass-mailed solicitation letters. *See Stretton v. Disciplinary Board of the Supreme Court of Pennsylvania*, 944 F.2d 137 (3d Cir. 1991). But that court has never addressed an anti-solicitation rule in the context of in-person requests, and it has not had occasion to revisit its anti-solicitation holding as applied to mass mailings since *White I*.

Under these circumstances, the Court would benefit from continued percolation of this issue, and in particular from the full Eighth Circuit's consideration of this issue in *Wersal*. Because of the

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[3] In addition, since *White I*, only one state supreme court has addressed (in litigation) the validity of a canon prohibiting direct personal solicitation by judges and judicial candidates, and that court, perhaps unsurprisingly, upheld its own canon. *See In re Dunleavy*, 838 A.2d 338, 351 (Me. 2003). Another state supreme court did the same over a decade before *White I*, *In re Fadeley*, 802 P.2d 31, 41-43 (Or. 1990), but has yet to revisit the matter (in litigation) after *White I*.

attention that case is receiving from a complement of eleven Article III judges, it may generate multiple opinions shedding light on the issue from various perspectives. The Court will be in a much better, and more informed, position to address the direct solicitation issue once the *Wersal* decision is handed down.[4]

V. This Case Does Not Present Any Significant As-Applied Challenges

The Commission has never enforced the Commitments Canon, or its predecessor canons, against anyone for answering IRTL's questionnaire. As the Seventh Circuit observed, "[n]one of the nine questions calls for a 'commitment' or 'promise' on any issue." Pet. App. 18a. This lack of enforcement threat is significant, because, in an as-applied challenge, the state typically explains how the rationale for the statute supports enforcement under the particular circumstances. *See, e.g., Federal Election Comm'n v. Beaumont*, 539 U.S. 146, 147 (2003). But here, with no enforcement record and no demonstrated intent of the Commission to enforce the canons against those who answer the IRTL questionnaire, there is no enforcement rationale to

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[4] Continued percolation is particularly important since any decision the Court makes on this issue will have implications for the federal judiciary's own anti-solicitation canon: "A judge should not personally participate in fund-raising activities, solicit funds for any organization, or use or permit the use of the prestige of judicial office for that purpose." Code of Judicial Conduct for United States Judges, Canon 4(C).

weigh against the petitioners' asserted rights to answer the questionnaire.

The Petition also urges the Court to consider as-applied challenges to the Partisan Activities and Direct Solicitation Canons, but there is no reason to think the law would be improved or developed in any meaningful way by doing so. Judge Certo seeks an order permitting him to be a delegate to the Indiana Republican Convention and a Republican Party spokesman at the Eastern Indiana Model Legislature. He also wants to solicit political donations directly from his family and friends. Judge Certo, however, points to no courts that have considered similar applications and come out differently, nor identifies any established First Amendment doctrines that have been threatened by the Seventh Circuit's refusal to grant these particular carve-outs.

Judge Certo's legal theory in this regard is that the state's regulatory interests, even if sufficiently compelling in other circumstances, do not apply to what *he* wants to do. But the state's interest in preventing judges from abusing their prestige and becoming party functionaries applies directly to his proposed convention delegate and party spokesman roles. And whether the state's interest in preventing coercive misuse of judicial power applies when Judge Certo solicits his mother and uncles is hardly an issue of pressing national significance.

The Petition also argues that the Seventh Circuit's dictum directing Certo to the Commission

for an exemption to solicit his friends and relatives amounts to an unconstitutionally burdensome "prior restraint," citing *FEC v. Wisconsin Right to Life*, 551 U.S. 449 (2007), *Citizens United v. FEC*, 130 S.Ct. 876 (2010), and *Buckley v. Valeo*, 424 U.S. 1 (1976). *See* Petition at 28-30. The Petition patently exaggerates the Seventh Circuit's observations in this regard.

In the campaign-finance cases cited in the Petition, the Court rejected the availability of bureaucratic interpretation as a way to save unconstitutionally vague, substantially overbroad statutes. *See Citizens United*, 130 S.Ct. at 889; *FEC*, 551 U.S. at 468-69; *Buckley*, 424 U.S. at 43. Here, however, the Seventh Circuit was not citing the Commission's advisory role to save statutes having similar flaws—the Direct Solicitation Canon is perfectly clear (as the Petition seems to concede), and even if the Partisan Activities and Commitments Canons are somehow vague, they do not forbid a substantial amount of protected speech such that their facial validity can be called into question. Pet. App. 22a-23a. That is why *Letter Carriers*, 413 U.S. at 580, and *Parker v. Levy*, 417 U.S. 733 (1974), which permit reliance on the administrative process to interpret vague statutes that do not threaten protected speech, and not the campaign-finance cases, apply here. *See* Pet. App. 24a-25a.

The decision below commented on the Commission's advisory role only when rejecting Certo's demand for exemptions from the facially

valid canons because (particularly owing to state-federal comity) the Commission, not a federal court, is the proper forum for seeking that relief. *See* Pet. App. 26a. And if the Commission were to refuse Certo's request to exempt some idiosyncratic activity that the First Amendment might protect, a pre-enforcement challenge (meaning a challenge to that application of the law *before* Certo risks violating the law) would still be available. The courts in that situation, unlike in this case, would even have the benefit of an actual, direct interpretation by the Commission.

At bottom, if Indiana may generally ban direct solicitations by judges and judicial candidates, there is no reason to review whether the Seventh Circuit was correct in guiding Judge Certo to the Commission for advice about soliciting his friends and relatives. As the Seventh Circuit put it, "[l]aws need not contain exceptions for every possible situation in which the reasons for their enactment are not present," Pet. App. 10a, and the availability of a process by which the Commission may create *exceptions* to the Direct Solicitation Canon perforce does not increase the (already allowable) burdens of the law. Hence, there is no plausible constitutional claim here, let alone any lower-court conflict that needs to be resolved.

VI. There is no Point Reviewing Superseded Canons

Petitioners continue to challenge prior judicial canons 5A(3)(d)(i) and (ii) (restricting pledges,

promises and commitments by judges and judicial candidates), which, by virtue of the canons adopted effective January 2009, are no longer in effect. The Seventh Circuit correctly held that "[b]ecause Canon 5A(3)(d) is no longer in force, neither Bauer nor anyone else can be 'chilled' by the risk of future punishment. . . . There is accordingly no need for prospective relief concerning pre-2009 rules." App. 7a-8a.

Petitioners have not established any likelihood that the superseded canons would be enforced against any of them, and they certainly have not demonstrated any circuit conflict as to whether superseded canons can ever present a live issue for judicial review. To the contrary, in *Kansas Judicial Review v. Stout*, 562 F.3d 1240 (10th Cir. 2009), the Tenth Circuit deemed moot a challenge to Kansas' superseded pledges and promises canons since there had never been an adjudication, or threats to enforce, under the old canons. *Id.*

Here, similarly, it is "inherently unlikely and thus not foreseeable" that the Commission will enforce the superseded canons against the petitioners. *Id.* at 1248. Thus, the claims challenging the validity of former Canons 5A(3)(d)(i) and (ii) are non-justiciable. As the Seventh Circuit observed, "[i]f the Commission ever hales Bauer (or anyone else) before the Supreme Court of Indiana on a charge of violating the former Canon 5A(3)(d), a defense based on the first amendment can be raised and adjudicated in the regular course." App. 8a.

CONCLUSION

The Court should deny the Petition, but in the alternative it should restate (as set forth herein) any questions as to which it grants *certiorari*.

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